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Flogging children with religion: a comment on the House of Lords' decision in *Williamson*

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***Ecc. L.J. 339** On 24 February 2005 the House of Lords delivered a significant judgment on freedom of religion, parental rights to religious freedom, corporal punishment and children's rights. This paper examines *R (Williamson) v Secretary of State for Education and Employment*.¹ It argues that the House of Lords adopts a much more generous approach to freedom of religion or belief than the European Court of Human Rights. But it is also critical of the argument derived from children's rights.

The abolition of corporal punishment at schools in England and Wales developed from the Education (No 2) Act 1986,² to section 548 of the ***Ecc. L.J. 340** Education Act 1996³ (as extended by section 131 of the School Standards and Framework Act 1998).⁴ In parallel, the law has redefined reasonable chastisement, from the Education Act 1993⁵ to the Children Act 2004.⁶ Accordingly, to be lawful, corporal punishment administered by a parent must now stop short of causing actual bodily harm.

The applicants (a headmaster, teachers and parents of children at independent schools) believed that the corporal punishment of children was necessary in order to form a 'godly character'. They sought a declaration that section 548 did not apply 'where parents, having the common law right to discipline their child, expressly delegate this right to a teacher'.⁷ In such a case the teacher is not acting as a teacher 'as such' as the statute requires. They argued that this interpretation of section 548 would accord proper respect to the deliberate decision of parents in respect of the education and disciplining of their children. Essentially, they claimed that the extended statutory ban on corporal punishment was incompatible with their right to freedom of religion and freedom to manifest their religion in practice under Article 9 of the European Convention on Human Rights. They also argued that there was a breach of their rights under Article 2 of the First Protocol of the Convention. They lost at first instance,⁸ and in the Court of Appeal.⁹ The House of Lords dismissed the appeal and found that section 548 did not violate the rights of the applicants, either parents or teachers, under Article 9, or the rights of the parents under the Protocol.

A GENEROUS APPROACH TO FREEDOM OF RELIGION AND BELIEF

The Court of Appeal had decided the case on narrow Article 9(1) grounds. It had held that section 548 did prevent the delegation by parents to teachers of the parental right to administer reasonable physical chastisement. The judges disagreed whether corporal punishment in this context was a manifestation of religion or belief under Article 9(1). However, they all agreed that section 548 did not constitute an interference with freedom of religion, as it was possible for the applicants lawfully to manifest their belief in corporal punishment by alternative means. Accordingly, there was no breach of Article 9 or the Protocol. The House of Lords rejected the ***Ecc. L.J. 341** further appeal, but took a more generous approach to freedom of religion and belief and closely followed the structure of Article 9. Under Article 9(1), the applicants' beliefs were engaged and they were manifesting their religion. Section 548 constituted an interference with the manifestation of their beliefs but one which was justified under Article 9(2).

The House of Lords gave a wide scope to freedom of religion or belief, and Lord Nicholls recognised that 'it is not for the court to embark on an inquiry into the asserted belief and judge its "validity"'.¹⁰ Lord Walker agreed that 'in matters of human rights the court should not show liberal tolerance only to tolerant liberals'.¹¹ This is remarkable, considering the on-going discussion between the 'compatibility' of religion with human rights principles, especially at European Court of Human Rights level. For example in *Refah Partisi (The Welfare Party) v Turkey*, that court said this:

the Convention institutions have expressed the view that the principle of secularism is certainly one of the fundamental principles of the State which are in harmony with the rule of law and respect for

human rights and democracy. An attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one's religion and will not enjoy the protection of Article 9 of the Convention.¹²

The same point was made in *Ahlin v Turkey*,¹³ and the European Court of Human Rights has also stated, for example, that Sharia law is incompatible with democracy.¹⁴ In the view of Strasbourg, it appears that there is no tolerance for those who are intolerant, no freedom for those who do not respect the freedoms of others. The House of Lords differs from the position of Strasbourg, as it seems to advocate a more liberal and 'tolerant' approach to religious beliefs, an approach which is to be welcomed.

MANIFESTATION

The decision of the Court of Appeal has been criticised because it was narrow, intruded on the applicants' beliefs and was inconsistent with the nature of freedom of conscience and religion as a human right.¹⁵ In contrast **Ecc. L.J. 342* the House of Lords simply accepted that the applicants were manifesting their beliefs when they authorised a child's school to administer corporal punishment.¹⁶

In the present case the essence of the parents' beliefs is that, as part of their proper upbringing, when necessary children should be disciplined in a particular way at home and at school. It follows that when parents administer corporal punishment to their children in accordance with these beliefs they are manifesting these beliefs. Similarly, they are manifesting their beliefs when they authorise a child's school to administer corporal punishment. Or, put more broadly, the claimant parents manifest their beliefs on corporal punishment when they place their children in a school where corporal punishment is practised. Article 9 is therefore engaged in the present case in respect of the claimant parents.¹⁷

The House of Lords relied on the distinction established by the European Commission on Human Rights in *Arrowsmith v United Kingdom*.¹⁸ In this case the Commission set up an important test to distinguish a 'practice' which is a manifestation of a religion or belief (falling under the protection of Article 9), from the broad range of actions which are merely motivated or inspired by them (not falling under the protection of Article 9). A direct link is needed between the belief and the action, and this has come to be interpreted as a 'necessity test'. Strasbourg has been cautious in its approach, focusing on those elements of observance and ritual which are central to the lives of believers, rather than on activities that are motivated by the religious beliefs.¹⁹ On occasions it seems that Strasbourg substitutes its own judgment of religious necessity for that of applicants.²⁰ It is also unlikely that Strasbourg would accept corporal punishment as a manifestation of religion or belief.²¹

The House of Lords is more generous than Strasbourg, and Lord Nicholls said: 'I do not read the examples of acts of worship and devotion given by the European Commission ... as exhaustive of the scope of manifestation of a belief in practice'.²² This raises the question whether the distinction between manifestation and motivation is tenable. Shifting the discussion to the issue of justification is to be welcomed because this is the real battleground with human rights and corporal punishment.

**Ecc. L.J. 343* JUSTIFICATION

The House of Lords then examined whether the restriction was justified under Article 9(2). After finding that the interference was prescribed by law, and was aimed at protecting children and promoting their wellbeing,²³ it found that the restriction on parental rights was not disproportionate:

the legislature was entitled to take the view that, overall and balancing the conflicting considerations, all corporal punishment of children at school is undesirable and unnecessary and that other, non-violent means of discipline are available and preferable. On this Parliament was entitled, if it saw fit, to lead and guide public opinion. Parliament was further entitled to take the view that a universal ban was the appropriate way to achieve the desired end. Parliament was entitled to decide that, contrary to the claimants' submissions, a universal ban is preferable to a selective ban which exempts schools where the parents or teachers have an ideological belief in the efficacy and desirability of a mild degree of carefully-controlled corporal punishment ... Parliament was entitled to take this course because this issue is one of broad social policy. As such it is pre-eminently well suited for decision by Parliament.²⁴

Lord Nicholls adopted a classic human rights approach as he identified the conflict between parents

and the State. He found that there was a large support in favour of the ban on corporal punishment, including parliamentary debate, a number of reports in England, and European Court of Human Rights case law, therefore Parliament was entitled to legislate on the issue.

CHILDREN'S RIGHTS AND CORPORAL PUNISHMENT

Baroness Hale outlined the issue from the perspective of children's rights and differed from the classic human rights approach adopted by Lord Nicholls. She said:

This is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no-one here or in the courts below to speak on behalf of the children. No litigation friend has been appointed to consider the rights of the pupils involved separately from those of the adults. No non-governmental organisation, such as the Children's Rights Alliance, has intervened to argue a case on behalf of children as a whole. The battle has been fought on ground selected by the adults. This has clouded and over-complicated what should have been a simple issue.²⁵

She argued that the essential question had always been 'whether the legislation achieves a fair balance between the rights and freedoms of the **Ecc. L.J. 344* parents and teachers and the rights, freedoms and interests, not only of their children, but also of any other children who might be affected by the persistence of corporal punishment in some schools'.²⁶ Strasbourg has already acknowledged in *Martins Casimiro and Cerveira Ferreira v Luxembourg*,²⁷ and *Çiftçi v Turkey*,²⁸ that when there is a conflict between the parents' right to respect for their religious convictions and the child's right to education, the interests of the child prevail. Baroness Hale's statement is also reminiscent of Justice Douglas' dissent in *Wisconsin v Yoder*,²⁹ or the postscript of the South African Constitutional Court in *Christian Education South Africa v Minister of Education*.³⁰

To decide that there was a consensus in support of the abolition of corporal punishment, especially at school, Baroness Hale used Strasbourg case law and a number of reports published in England. She also pointed to various provisions of the United Nations Convention on the Rights of the Child,³¹ as well as the Concluding Observations on the United Kingdom by the United Nations Committee on the Rights of the Child.³² Accordingly, with 'such an array of international and professional support, it is quite impossible to say that Parliament was not entitled to limit the practice of corporal punishment in all schools in order to protect the rights and freedoms of all children'.³³

There are problems with the approach adopted by Baroness Hale. Instead of being what she calls 'a simple issue', she makes it more complicated by re-characterising it as involving children's rights. She states that 'a child has a right to be brought up without institutional violence',³⁴ yet it is ambiguous what that means. Moreover there is ambiguity whether the ban was designed to protect the rights of children or 'merely expresses a belief that education without corporal punishment is better than education with corporal punishment'.³⁵ John Eekelaar suggests that this case is all about who decides what is best for the child, and that arguing for the infliction or the non-infliction of corporal punishment as being better for children would require a choice between two competing versions of the child's **Ecc. L.J. 345* best interests, neither of which is easily susceptible to empirical proof.³⁶ One could argue that Lord Nicholls' approach is the simpler because it represents a straightforward claim between two competing views of the child's best interests - the State and the parents. Baroness Hale considered the children as a third element in the equation. It is not possible to articulate an independent view of the child's rights as Baroness Hale wishes. What she puts forward is merely one view of the best interests of the child, which she chooses to call 'children's rights'.

CONCLUSION

In comparison with the lengthy--and at times contradictory--judgments in the Court of Appeal, the relative brevity and the clarity of the speeches in the House of Lords are welcome. In particular, the Law Lords used the framework of Article 9 overtly and comprehensibly, paying careful attention to freedom of religion and belief. The House of Lords followed a classic human rights approach, and it is only at the stage of the justification of the restriction that it found in favour of the State rather than the individual. By contrast it is not clear that the approach adopted by Baroness Hale, which consists in balancing children's with parents' rights, assists in resolving competing views of the child's best interests.

1. *R v Secretary of State for Education and Employment, ex parte Williamson* [2005] UKHL 15, [2005] 1 FCR 498, [2005] 2 AC 246, noted at (2005) 8 Ecc LJ 237. For convenience, references hereafter to the speeches in the House of Lords are simply prefaced *Williamson*.
2. Applicable to maintained schools (state schools) and non-maintained schools (independent schools) receiving public funding. This followed *Campbell and Cosans v United Kingdom*, Applications 7511/76-7743/76 (1982).
3. The Education Act 1996, s 548(1), provides: 'Corporal punishment given by, or on the authority of, a member of staff to a child--(a) for whom education is provided at any school ... cannot be justified in any proceedings on the ground that it was given in pursuance of a right exercisable by the member of staff by virtue of his position as such'.
4. Applicable to privately-maintained schools.
5. This followed *Costello-Roberts v United Kingdom*, Application 13134/87 (1993).
6. This followed *A v United Kingdom*, Application 25599/94 (1998).
7. *Williamson*, paragraph 12.
8. *R (on the application of Williamson) v Secretary of State for Education and Employment* [2002] 1 FLR 493, Elias J.
9. *R (on the application of Williamson) v Secretary of State for Education and Employment* [2003] QB 1300, [2003] 1 All ER 385, CA.
10. *Williamson*, paragraph 22.
11. *Williamson*, paragraph 60.
12. *Refah Partisi (The Welfare Party) v Turkey*, Applications 41340/98-41342/98-41343/98-41344/98 (2003), paragraph 93.
13. *#ahin v Turkey*, Application 44774/98 (2004), paragraph 99.
14. *Refah Partisi*, paragraph 123. This view has been criticised by M Evans, 'Believing in Communities, European Style' in N Ghaney (ed), *The Challenge of Religious Discrimination at the Dawn of the New Millennium* (Martinus Nijhoff Publishers, Leiden & Boston 2004), pp 133-155, at pp 153-154; and K Boyle, 'Human Rights, Religion and Democracy: The Refah Party Case' (2004) 1(1) *Essex Human Rights Review*, 1, at 12-14.
15. H Cullen, 'Case Commentary--*R (Williamson) v Secretary of State for Education and Employment* -- Accommodation of Religion in Education' (2004) 16(2) *Child and Family Law Quarterly* 231, at 233-234. John Eekelaar also argued that '[q]uestions of value demand a wider perspective than that apparently allowed in a determination under Article 9(1) alone': J Eekelaar, 'Corporal punishment, parents' religion and children's rights' (2003) 119 *LQR* 370 at 372.
16. *Williamson*, paragraphs 36-37. The rights of the parents (but not of the teachers) under the Protocol were also engaged.
17. *Williamson*, paragraph 35.
18. *Arrowsmith v United Kingdom*, Application 7050/75 (1978).
19. M Evans (n 15 above) at 138.
20. *Valsamis v Greece and Efstratiou v Greece*, Applications 21787/93-24095/94 (1996).
21. *Seven Individuals v Sweden*, Application 8811/79 (1982).
22. *Williamson*, paragraph 32.
23. *Williamson*, paragraphs 48-49.
24. *Williamson*, paragraphs 50-51.
25. *Williamson*, paragraph 71.
26. *Williamson*, paragraph 74.
27. *Martins Casimiro and Cerveira Ferreira v Luxembourg*, Application 44888/98 (1999).
28. *Çiftçi v Turkey*, Application 71860/01 (2004).
29. *Wisconsin v Yoder* 406 US 205 (1972), at 241-242. He said that in the dispute opposing the state to the Old Amish Order community about exempting children from the last two years of the state's compulsory education requirements, the children were not parties to the procedure and their religion had not been ascertained.
30. *Christian Education South Africa v Minister of Education* (2000) 4 SA 757, (2000) 9 BHRC 53.
31. Eg United Nations Convention on the Rights of the Child (1989), Arts 3(1), 37, 19(1) and 28(2).
32. *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, UN Doc CRC/C/15/Add.34 (1995) and UN Doc CRC/C/15/Add.188 (2002).
33. *Williamson*, paragraph 86.
34. *Williamson*, paragraph 86.
35. J Eekelaar (above), (2003) 119 *LQR* 370 at 372.
36. Eekelaar at 375.